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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1949, TERM

FRANK K. HUNTER, ET AL,
Petitioners,

vs.

MADISON AVENUE CORPORATION,
Respondent.

No. 54 MISC.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

TO THE HONORABLE, THE FIRST JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of the Case

This suit originated in the District Court of the United States for the Western District of Tennessee, Western Division, by the filing of a complaint by certain maintenance employees of an office building against the owner thereof in which they sought to recover alleged unpaid minimum wages and overtime compensation, together with liquidated damages, attorney's fees, and costs under the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A., Sec. 201, et seq., on the ground that the tenants of said office building were engaged in commerce and in the production of goods for commerce.

The defendant in said suit, Madison Avenue Corporation, respondent in this Court, is the owner and operator of the office building involved, the same being the twenty-nine story office building situated in Memphis, Tennessee, known as the Sterick Building, which was during all the times involved exclusively devoted to the housing of a miscellaneous variety of offices.

Petitioners' complaint was filed on April 2, 1947, and, in addition to the allegation that Respondent's tenants were engaged in commerce and in the production of goods for commerce, it was also alleged that Respondent was operating said building as a "loft building".

Subsequently, on October 22, 1947, which was the day of the commencement of trial in the District Court, Petitioners, with leave of the Court, filed an amendment to their original complaint in which they alleged in general effect that Respondent owner of the building was itself engaged in interstate commerce by reason of the fact that it collected waste paper from the various offices in the building in its daily cleaning operations; that after such waste paper was removed from the various offices, it was transported to the basement of the building and baled, and then sold to local waste paper dealers, who, in turn, resold to other firms who processed some of it into roofing material, with some of such roofing material eventually being shipped in interstate commerce; and that Respondent, by reason thereof, was itself engaged in the production of goods for commerce, and, therefore, its maintenance employees who handled such waste paper were covered by the Act. (R. Vol. 1, Pg. 25 and Pg. 30.)

Respondent admitted that Petitioners had been employed as maintenance workers in said building, but

denied that the provisions of said Act were applicable to the facts in the instant case.

It is undisputed that at the time of the trial in the District Court there were more than 300 separate tenants occupying separate space in said building. (R. Vol. II, Pgs. 713-715; Exhibit C, Vol. II, Pg. 755.)

Petitioners, in their effort to establish that the activities of a sufficient proportion of all the tenants of said building were such that its maintenance employees were covered by the Act, called as their witnesses 106 of them, which was only about a third of the total number of tenants. (R. Vol. II Pgs. 711-712; Exhibit B, R. Vol. II; Pgs. 750-754.) As Petitioner did not call on the other two hundred odd tenants to testify, or otherwise attempt to show what their activities were, it must be assumed that Petitioners thereby conceded that the tenants who were not called on to testify were not even claimed to have been engaged in commerce or the production of goods for commerce.

The Court's attention is further directed to the fact that, although Petitioners alleged in their complaint that the Sterick Building was a "loft building", not an iota of evidence was introduced in support thereof, and no such question was involved in the lower courts.

Activities of the Various Tenants Who Testified.

Respondents dispute the accuracy of the statement of facts contained in Petitioners' petition and supporting brief in which it is asserted that 84.8% of all the average rented area of the building was occupied by tenants

who were engaged in the production of goods for commerce.

As seen above, it is undisputed in the record that only the space occupied respectively by those tenants of said building who were called on to testify was before the Court. Simple addition of the figures as to the space occupied by those tenants as shown by said Exhibit B will reveal that such space aggregated only about half the total space of the whole building.

The record further discloses without dispute that the total area of said building is 314,787 sq. ft. (Exhibit A, Pg. 749) and that the rentable area thereof is 234,389 sq. ft. (Exhibit A, Pg. 749).

Since the record is silent as to the names and activities of the two hundred odd tenants of the building and the respective space occupied by each, who were not called on to testify, it follows that the statement by counsel for Petitioners that 84.8% of the rentable area of the building was used by tenants for the production of goods for commerce cannot be accurate, even though it be assumed that all the tenants who testified were engaged in the production of goods for commerce, which is also unqualifiedly disputed.

As an illustration of the strained assumptions on which counsel for Petitioners have based their said computation as to the proportion of space in said building occupied by tenants who are engaged in the production of goods for commerce, it will be seen by reference to Petitioners' Brief, Pg. 21, that the branch office of the Boy Scouts of America is included among the tenants alleged to be so

engaged. It will be noted also that the Butchers Union and Bakers Union were among the tenants called on to testify. (Exhibit B, Vol. II, Pg. 753.)

As will be hereinafter next below shown, the District Court held that only approximately three per cent of the tenants occuping three and a half per cent of the rentable space of the building, were engaged "to some extent" in handling and working on goods and materials which can be classed as producing for commerce. (R. Pg. 744-745.)

Judgment of District Court.

After a full hearing, which consumed three and a half days, the District Court ruled as follows:

> "THE COURT: Now, gentlemen, on the main question under consideration at this time, many tenants who are identified with businesses of large corporations operating around the country, and who may be important links in the chain of commerce, cannot be considered as tenants who are engaged in the production of goods for commerce because it is not shown that such tenants actually and directly manufacture, process, work on in some way, or produce goods for commerce.
>
> "Some of the tenants who have testified in this case operate only locally, that is, in the State of Tennessee. The de minimis doctrine might well be applied with respect to the out of state operations of some of them.
>
> "Now, the burden, of course, is upon the plaintiff maintenance and service employees to show they come within the coverage of the Act; more particularly, on the issue presently before the Court, that an adequate or substantial proportion of the tenants in the defendant's building are engaged in the actual, physical production of goods for commerce,

or that an adequate proportion of the rented area of the defendant's building is used by tenants engaged in the production of goods for commerce.

"Now, the plaintiffs have not met this burden in either respect, and the lawsuit must therefore be dismissed, at the plaintiffs' cost. The law on the question is well settled by the simple findings of fact, which I shall now make . . " (R. 743-744.)

Thereafter, the District Court made its findings and conclusions, which are as follows:

1. The Sterick Building is and was during the period under investigation operated as an independent enterprise with space leased to numerous business concerns for an unrestricted variety of office work. (R. 744, 745.)

2. Approximately three per cent of the tenants, occupying three and one-half per cent of the rentable space, are engaged to some extent in handling and working on goods and materials which can be classed as producing for commerce. (R. 745.)

3. The leasing of office space in an office building which is used for carrying on all ordinary office activities is local business, and maintenance employees of such building serving tenants as such are not engaged in occupations necessary to the production of goods in commerce within the meaning of the Fair Labor Standards Act and are not within the coverage of the Act. (R. 746.)

4. Assuming Complainants actually performed duties for all of the tenants in the Sterick Building in futherance of the tenants' business herein involved, they cannot recover. (R. 746.)

5. The waste paper which was gathered from the building was sold to a local dealer who in turn disposed of it to other local concerns who processed it into roofing insulations and loaded it into boxcars from their platform, an undetermined portion of which probably went out of the state. "It is far fetched to say under these conditions that plaintiffs, in handling this material as stated; are engaged in an occupation necessary to the production of goods in commerce. We don't know how much went into commerce and that that did was too many steps removed from the handling processes to come within the confines of the Act. I really don't think the handling of waste paper in the Sterick Building is a matter of any consequence." (R. 746-747.)

JUDGMENT OF COURT OF APPEALS.

The Court of Appeals for the Sixth Circuit in an opinion delivered April 22, 1949, affirmed the decision of the District Court dismissing Petitioners' suit, its opinion, reported in 172 Fed. 2(d) 164, being found in this record at pages 778-781.

In its opinion, said Court expressly concurred in the findings of the District Court that said Sterick Building was during the period of the investigation operated as an independent enterprise, and that its business was that of leasing space to numerous business concerns for an unrestricted variety of office work, and held, as did the District Court by necessary implication (R. Vol. I, Pgs. 68 and 238) that this case was controlled by the ruling of this Honorable Court in the case of *Ten East* 40th *Street Building v. Callus,* 325 U. S. 578, to the effect that the renting of office space in a building set aside exclusively

for an unrestricted variety of office work is local business and makes the employees of such a building engaged in local business, and that, therefore, as the Sterick Building was engaged in local business, its employees, the petitioners, were likewise so engaged, and were not covered by the Act.

The Court of Appeals also expressly affirmed the holding of the District Court in reference to the gathering of waste paper, which was that the gathering of such paper from the various offices and its removal to the basement where it was baled and disposed of to junk dealers, with "some of it" subsequently moving into interstate commerce, did not constitute the production of goods for commerce within the purview of the Act, and did not bring petitioners within its coverage, said Court's ruling in connection therewith being as follows: (R. Pg. 781, A-B.)

> "With respect to the contention that appellee itself was engaged in the production of goods for commerce by reason of the fact that it caused the waste paper, gathered from the offices of the building in cleaning operations, to be sold to a waste paper dealer, that some of it was thereafter processed into roofing felt, and, of this, a certain amount eventually found its way into interstate commerce, we agree with the view of the district court that such part of the roofing material as may have gone into commerce was too many steps removed from the process of handling by the building employees, to come within the confines of the Act. Where some inconsequential incident of interstate commerce happens to result from the general conduct of a fundamentally intrastate business, the rule of de minimis is applicable and the Act does not apply. *Hill v. Jones*, 59 F. Supp. 569.

Jurisdiction.

Statement of Petitioners as to the basis of jurisdiction of this Court to grant writs of certiorari is not challenged.

ARGUMENT.

Reasons Relied Upon for Allowance of Writ Are Inadequate.

It is insisted that the writ of certiorari prayed for herein should be denied, because the grounds asserted in support thereof fall far short of the character of any of the special and important reasons indicated as those which will be considered in connection therewith under the rules of this Court. See Rule 38, Section 5(b); Petition, Pgs. 11-12.

It is submitted that, when carefully analyzed, the reasons assigned for the allowance of the writ resemble far more closely the character of reasons ordinarily assigned in a petition to re-hear than they do the special and limited reasons subject to consideration by this Court in connection with a writ of certiorari.

It is conceded by Respondents that subsequent to the decision in the case of *Kirschbaum v. Walling*, 316 U. S. 517, and prior to the decisions of this Court in the cases of *Ten East 40th St. Building v. Callus*, 325 U. S. 578 and *Borden v. Borella*, 325 U. S. 679, there was a conflict in the opinions of the several circuit courts of appeal and district courts as to the applicability of the Act involved as to office buildings other than those which are strictly "loft" in character, and it will be seen by reference to the decisions in said *Callus* and *Borden* cases, both of which were delivered on the same day, that this Court

granted certiorari in both cases for the reason that there was such conflict of opinion at that time, and in deciding said cases, this Court intended to and did settle once and for all the questions as to the applicability of the Act as to office buildings other than "loft buildings".

Since the decisions in said two cases were handed down, the only question which remains for the decision of the lower courts is the determination under the facts of each case of the classification of office buildings to which the building involved belongs.

As shown in the statement of the case, supra, the Court of Appeals concurred in the finding of the District Court in this case that the office building involved was exclusively devoted to the housing of all the usual miscellany of offices and that Respondent's business consisted exclusively of renting office space for an unrestricted variety of office work, and that, therefore, the dicision of this Court in said *Callus* case was conclusive and controlling.

The proposition that the Supreme Court will generally regard concurrent findings of two lower courts as conclusive, is well settled.

Anderson v. Abbott, 321 U. S. 349;
Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 321 U. S. 275.

Also see 54 Am. Jur., Pg. 904 and numerous Supreme Court cases cited in Note 12.

Counsel for Petitioners have not attempted to argue that both lower courts have not unequivocally held that, under the facts in the record, the Sterick Building belongs

in the category of office buildings under consideration in said *Callus* case whose business of renting space was held to be local, but, in effect, argue at great length that this Court erred in holding that the business of renting space in an office building exclusively set aside for an unrestricted variety of office work constituted local business, when, in the opinion of counsel for Petitioners, this Court should have adopted the theory that the typing, multigraphing and mimeographing of letters, reports, bulletins and other papers for distribution interstate by tenants constituted production of goods within the meaning of the Act and brought the building involved under its coverage.

Under the record in this case, it is obvious that it could not have been argued with propriety that the office building involved in the *Callus* case and the one in this case were not of identical kind and character, and it is significant to note that the building involved in this case is devoted in a larger proportion and more pronounced degree for the housing of various offices for heterogeneous businesses than was the building involved in the *Callus* case, as the latter was a forty-eight story office building with about one hundred tenants, whereas the Sterick Building is a twenty-nine story building and houses more than three hundred separate tenants engaged in various and miscellaneous businesses.

Counsel for Respondent do not believe that it would serve a good purpose to go to the great length herein that would be necessary to discuss and differentiate in detail the seventy-odd cases cited in Petitioners' brief, for the reason that practically all were decisions handed down by lower courts before this Court delivered its opinions in the *Callus* and *Borden* cases, and in large

part, before the decision in the *Kirschbaum* case was delivered.

As stated above, by its decisions in said three cases, this Court has recognized that three separate distinct kinds of office buildings are being operated throughout the nation and settled the law as to the coverage of the Act in connection with each of the three different classifications thereof, and while perhaps unnecesesary, the holdings in said three cases will be briefly summarized.

In *Kirschbaum v. Walling*, supra, the building involved was classified as a "loft building", and as the space therein was concededly devoted to the production of goods for commerce, it was held that the building was covered by the Act.

In said case of *Borden v. Borella*, another classification for office buildings was recognized, and in that case it was held that where the building was owned and operated by an interstate producer with its offices consuming more than half of the total rentable area of the building from which its operations carried on nationwide were managed and controlled, such building was covered by the Act.

In said case of *Ten East 40th St. Building v. Callus*, this Court properly recognized that there was a third classification of office buildings, and plainly and expressly held in language not easily susceptible of misinterpretation that an office buildidng, such as the one involved in the instant case, which was set aside exclusively for an unrestricted variety of office work, fell into a different

classification from the two buildings involved in said *Kirschbaum* and *Borden* cases and was not covered by the Act, its business being strictly local.

The only other case citing the Act in relation to any kind of an office building which has been passed on by this Court since the decisions in the *Borden* and *Callus* cases were handed down, so far as counsel for Respondent can ascertain, and no such other case is cited by Petitioners, is the case of *Schulte v. Gangi*, 328 U. S. 108, in which it was held that under the facts under investigation as to the activities of tenants of the building involved, it fell into the category of a "loft building" under the decision in the *Kirschbaum* case. However, the ruling as to the character of office building involved in the *Callus* case was not changed.

The only other Supreme Court cases decided since the *Borden* and *Callus* cases which were cited by Petitioners are the cases of *Mabee v. White Plain Publishing Company*, 325 U. S. 172 *and Roland Electrical Company v. Walling*, 326 U. S. 656, and no summary of either is necessary, as in neither case was an office building involved.

Counsel for Respondent call attention to the fact that counsel for Petitioners assigned as a reason for the allowance of the writ that this Court denied certiorari in the cases of *Baldwin v. Emigrant Industrial Savings Bank*, 150 Fed. 2(d) 524, 326 U. S. 767, and *Darr v. Mutual Life Insurance Company of New York*, 169 Fed. 2(d) 262, 69 S. Ct. 166, in which the Court of Appeals had held maintenance workers of an office building to be covered. It will be noted that in these cases the lower courts were

concerned only with determining the factual issue as to the category of office buildings into which the building involved fell under the holdings in said three cases above discussed, and counsel for Respondent deem it unnecessary to cite authority on the proposition that the denial of the writs imported no expression of opinion by this Court on the merits involved in the two cases.

Argument on Issue Whether Gathering, Baling and Disposal of Waste Paper Constitute Production of Goods in Commerce.

As to this proposition, the Court's attention is directed to the fact that, although Petitioners in their brief argue at much length and cite numerous cases in support of the contention that Respondent, by reason of its gathering, baling and disposal to junk dealers of waste paper from the building, should have been held by the lower courts to have been engaged in the production of goods for commerce within the confines of the Act, and that said courts erred in holding to the contrary, nevertheless, Petitioners completely omitted reference to such issue in their statement of reasons relied upon for the granting of the writ. If such omission does not completely preclude the consideration of such issue under this petition, it most certainly indicates that counsel for Petitioners themselves do not consider such issue a serious and important one.

In connection with this issue, the undisputed testimony reveals that prior to 1941, the year World War II commenced, with the consequent judicially known shortage of practically all commodities, the Sterick Building gave the waste paper gathered from offices in the building to junk dealers for the service of hauling it out of the building. It had to be removed from the building every day

to comply with the City fire regulations designed to avoid the creation of fire hazards. Since 1941 the waste paper has been sold to junk dealers, but Respondent did not know and had no reason to be interested in knowing what disposition was made of it by the junk dealers and the use that was ultimately made of it by those who purchased it from the junk dealers during either the period such waste paper was given away, or the period during which it was sold. (R. Vol. 2, Pgs. 718-719; 735-738.)

The other proof in the record shows that the junk dealers sorted the waste paper and sold it in larger bales to a local firm which uses scrap paper as a part of the material necessary for the manufacture of roofing material. This local manufacturing firm sells its entire production of felt to another local firm, which sells to wholesale dealers, f.o.b. its plant, and the majority of its sales are within the State. (R. Vol. II, Pgs. 612-615; 372-375; 376-382; 736-738.)

But, regardless of the many reasons in support of the opinion of the Court of Appeals to the effect that the rule of "de minimis" applies to this issue, it should appear from slight reflection that, if the gathering and removal of waste paper from an office building in such manner as is shown from the record in this case that Respondent gathered and removed it from the Sterick Building, constitutes production of goods within the purview of the Act and brings the maintenance employees of the building involved within its coverage, then by this criterion alone it would be difficult to conceive of an office building that would not be ipso facto swept within the maw of the Act, and the result of such a holding would be that the long considered and carefully pre-

pared opinions of this Court rendered in the *Kirschbaum*, *Borden* and *Callus* cases would be relegated to the waste basket and the assiduous labor of this Court in connection therewith would be reduced to utter futility.

Conclusion.

A correct result having been reached by the Court of Appeals for the Sixth Circuit, and the reasons assigned as grounds for the granting of the petition being inadequate, the writ of certiorari prayed for should be denied.

Respectfully submitted,

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